

Khalilov (Migration) [2019] AATA 4404 (10 October 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Marat Khalilov
VISA APPLICANT:	Mr Nail Khalilov
CASE NUMBER:	1811805
DIBP REFERENCE(S):	BCC2018/504452
MEMBER:	Ian Garnham
DATE:	10 October 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Visitor (Class FA) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 600 (Visitor) visa: • Public Interest Criterion 4020 for the purposes of cl.600.213(a) of Schedule 2 to the Regulations.

Statement made on 10 October 2019 at 5:41pm

CATCHWORDS

MIGRATION – Visitor (Class FA) visa – Subclass 600 (Visitor) – Public Interest Criterion – false and misleading information – bogus document – untranslated employment certificate – employment confirmed by employer – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 600.213(a), Schedule 4, Public Interest Criterion 4020

CASES

4. *Arora v MIBP* [2016] FCAFC 35
5. *Batra v MIAC* [2013] FCA 274
6. *Trivedi v MIBP* [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 April 2018 to refuse to grant the applicant a Visitor (Class FA) visa under s.65 of the *Migration Act 1958* (the Act).
8. The applicant applied for the visa on 30 January 2018.
9. The departmental (Department of Home Affairs (DOHA)) delegate refused to grant the visa on the basis that the visa applicant did not satisfy the requirements of cl.600.213(a) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because they found that they did not meet Public Interest Criterion 4020.
10. The 51yo review applicant appeared before the Tribunal on 21 August 2019 to give evidence and present arguments. The 53yo visa applicant who is a brother of the review applicant did not attend the tribunal hearing. The review applicant is and Australian citizen and the visa applicant is a citizen of Kyrgyzstan.
11. The Tribunal hearing was conducted with the assistance of an interpreter in the Russian and English languages.
12. The review applicant was not represented in relation to the review.
13. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.600.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

15. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

16. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
17. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
18. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
19. In this case, the tribunal is satisfied, after taking extensive evidence from the review applicant and examination of the documentary evidence that there has been no element of fraud or deception by any person in relation to the visa application or that a bogus document was submitted to DOHA.
20. The delegate found that the visa applicant did not meet PIC 4020 because they found that the visa applicant: *...has provided, or caused to be provided, a bogus document or false or misleading information in relation to his visa application.*
21. Specifically they found that on 31 January 2018 the visa applicant provided evidence that was considered to be of a 'non-genuine' nature about his employment, including a bogus document. The document in question is an untranslated work certificate¹, dated 24/01/2018. Apparently this certificate states the visa applicant; *...has been employed at Inter Aliens OsOO as a sales manager.* It is an implicit finding in the delegate's decision that due to information received during checks conducted with the visa applicant's employers about his employment that the visa applicant had provided false and misleading information with respect to that employment.
22. With respect to the first finding of the delegate that the 'employment certificate' is a bogus document, I note that this conclusion was reached based on their inquiries made of the signatories (chief accountant and head of company) to the certificate. For the reasons I have set out below I have reached a different conclusion and am manifestly satisfied that this is not a bogus document.
23. With respect to the delegate's finding that false and misleading information about the visa applicant's employment was given I firstly note that they have recorded in the Decision

¹ At F: 67 (DOHA)

Record that further checks were conducted with the employer on 16 March 2017. As the application was not lodged until 30 January 2018 I consider this is a typographic error and the checks were probably conducted on 16 March 2018. In any event, the comments as recorded in the delegate's Decision Record do not indicate to me that he is not employed with the company. The chief accountant confirmed that the visa applicant worked for the company after viewing the certificate and the head of the company independently confirmed that the visa applicant worked there. The head of the company's statement that the visa applicant had worked there for more than one year is not inconsistent with the visa applicant's claim in his application² and CV³ that he has worked at the company since July 2013. I also accept the review applicant's evidence that employees in Kyrgyzstan are normally paid in cash and that the delegate mistakenly formed a view that the information was false based on imprecise responses from the company officials as set out above. Such a response is in keeping with a failure to consult formal company records concerning employees, if indeed such records exist.

24. Finally, the file contains significant photographic evidence and further photographic evidence was provided to the tribunal to demonstrate that the visa applicant has strong family connections in Kyrgyzstan. Least of which are his wife and 2 children. The purpose of the proposed 19 day visit by the visa applicant was to celebrate his brother's 50th birthday as the review applicant had attended his celebration in Kyrgyzstan. This occasion has now passed and the review applicant is unsure if the visa applicant will still want to visit him in Australia. This is in keeping with the visa applicant's failure to attend the tribunal hearing. The review applicant said he has pursued this matter as a point of principle and the tribunal acknowledges this is understandable in the circumstances of the case.
25. For these reasons I am satisfied that neither information that is false or misleading in a material particular or a bogus document has been provided by the applicants.
26. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

27. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused.
28. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

29. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
30. The DOHA file contains a copy of the visa applicant's Kyrgyzstan passport that was issued on 09/06/2017⁴. I am satisfied that this document satisfies the identity requirements.
31. Therefore, the applicant meets PIC 4020(2A).
32. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.600.213.

² At F: 124 (DOHA)

³ At F: 68 (DOHA)

⁴ At FF: 27 & 28 (DOHA)

DECISION

33. The Tribunal remits the application for a Visitor (Class FA) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 600 (Visitor) visa:
- Public Interest Criterion 4020 for the purposes of cl.600.213 of Schedule 2 to the Regulations.

Ian Garnham
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...